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Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

—v.—

SAINT CLAIR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF REVERSAL

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF REVERSAL

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted by *amicus curiae,* the American Arbitration Association, Inc. ("AAA"), not in support of either party, but to urge reversal of the decision below.[1]

[1] As required by Rule 37.6, *amicus curiae*, the AAA states that this brief was authored on its behalf by the counsel identified on the cover and the signature page, and that no one other than the AAA and its counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Amicus curiae, the AAA, is a not-for-profit, public service organization founded in 1926, after Congress' enactment of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* Today, the AAA offers a broad range of dispute resolution services through offices located in 37 cities throughout the United States and cooperative agreements with arbitral institutions in 39 countries around the world. Millions of non-union U.S. workers currently are covered by mediation and arbitration agreements that call for administration by the AAA. In 1999 alone, the AAA administered more than 1900 employment-related mediations and arbitrations for employees other than those covered by collective bargaining agreements.

In addition to maintaining administrative procedures, rules and guides for private mediations and arbitrations, the AAA trains and maintains rosters of mediators and arbitrators; publishes arbitration awards; conducts educational programs; provides membership services; and maintains library and research facilities. In 1995, the AAA was instrumental in the promulgation of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ("Due Process Protocol") designed to provide fairness, equitable treatment and procedural regularity in the extra-judicial resolution of employment disputes.[2]

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[2] Signatories to the Due Process Protocol, in addition to the AAA, include designees from the National Academy of Arbitrators, the Labor and Employment Law Section of the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the Society of Professionals in Dispute Resolution and the National Employment Lawyers Association. These organizations represent

Since the AAA regularly is engaged in the administration of employment arbitration agreements, as well as the education and training of arbitrators and mediators in employment issues, the AAA has a substantial interest in the Court's resolution of the important question presented by the Petition: Whether the Ninth Circuit erred in holding that Section 1 of the Federal Arbitration Act does not apply to contracts of employment. Moreover, the AAA's substantial experience with the arbitration of employment claims makes it uniquely qualified to comment on the significance and practical consequences of the Ninth Circuit's decision below and to provide a perspective which the AAA hopes will assist the Court in its consideration of the merits of this action. With this singular focus in mind, the AAA respectfully files this brief as *amicus curiae* to stress the desirability of vacating the decision below.[3]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, contrary to this Court's rulings in support of employment arbitration and the holding of every other circuit on the issue, threatens to remove the uniform

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employment attorneys, representatives of labor and management and dispute resolution professionals.

[3] The AAA has filed *amicus curiae* briefs in numerous arbitration-related cases previously before the Court, including *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *UBC Southern Council of Industrial Workers, Local Union No. 2713 v. Bruce Hardwood Floors*, 522 U.S. 928 (1997); and *Green Tree Financial Corp.-Alabama v. Randolph*, No. 99-1235 (*cert. granted* Apr. 3, 2000).

application of the FAA from millions of employment relationships currently covered by arbitration agreements across the country.

This Court has long emphasized that the FAA establishes a "national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Consistent with this policy, the Court has enforced agreements to arbitrate a wide variety of disputes, including, *inter alia*, statutory employment claims. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). As the Court has stressed, by arbitrating claims, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). *See also Gilmer*, 500 U.S. at 26, 31. Indeed, the AAA's National Rules for the Resolution of Employment Disputes ("Employment Rules") and the Due Process Protocol provide parties to an arbitration with explicit due process protections of their substantive rights, and preserve the right to assert a claim before the Equal Employment Opportunity Commission, the National Labor Relations Board, or any other government agency.

ARGUMENT

A WELL-ESTABLISHED NATIONAL SYSTEM FOR THE EFFECTIVE ARBITRATION OF EMPLOYMENT DISPUTES HAS DEVELOPED OVER THIS POST-*GILMER* DECADE

Nearly a decade ago, in the context of enforcing an agreement to arbitrate a statutory employment dispute, this Court emphasized that the FAA "reverse[d] the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and place[d] arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

A. In Reliance Upon *Gilmer*, Over 500 Companies Have Developed National Employment Arbitration Programs Using The Due Process Protocol And The AAA

In the years before the *Gilmer* decision, the AAA administered arbitration agreements arising under collective bargaining agreements, hundreds of individually negotiated employment contracts and a small number of employer-promulgated programs.[4] In the years after *Gilmer*, over 500 companies have adopted multi-step Alternative

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[4] According to the AAA's records, one of the first company-wide employment ADR programs, which included arbitration for the resolution of employment disputes, was implemented in 1955. Employment arbitrations, including under individual contracts, were administered under the AAA's Commercial Arbitration Rules until adoption of the Due Process Protocol in 1995.

Dispute Resolution ("ADR") programs, with arbitration usually as the final step, naming the AAA as the organization responsible for the administrative process. These arbitration provisions cover an estimated five million individuals employed nationally in a wide range of jobs including clerical workers, sales personnel, first line supervisors, middle managers and top executives in virtually every industrial and service sector.[5]

B. Substantive Rights Are Protected When Employment Arbitrations Are Administered Under The Due Process Protocol

As the use of arbitration to resolve employment disputes increased after *Gilmer,* the AAA took the initiative to address concerns over the fairness to employees required to arbitrate statutory claims by developing special Employment Rules, incorporating the protections of the Due Process Protocol.[6] Adopted by the AAA in 1995, the Due Process Protocol requires that all participants in arbitration be accorded, *inter alia*, the right to a neutral third party decision-maker, the right to select the arbitrator from a diverse pool,[7] the right to counsel,

[5] As a comparison, in the unionized labor context, virtually all collective bargaining agreements provide for arbitration of unresolved grievances, covering an estimated 15 million employees. The AAA administers almost 15,000 labor arbitrations each year.

[6] The texts of the Employment Rules and the Due Process Protocol may be found on the AAA's website, www.adr.org, under "Focus Areas–Employment."

[7] In accordance with the Due Process Protocol, the AAA has developed a diverse national panel of 575 arbitrators and mediators, who participate in the AAA's mandatory training. These arbitrators were recommended by

the right to discovery as authorized by the arbitrator, the right to the same remedies as those available in court (including the right to an award of attorney's fees in conformity with law), and the right to a written opinion.[8]

To ensure that these substantive and procedural rights of the parties to an arbitration provision are not compromised, the AAA reviews employer-promulgated ADR programs for compliance with the Due Process Protocol; if the AAA determines that a dispute resolution program materially deviates from these due process standards, the AAA will decline to administer cases under that program.

C. The Post-*Gilmer* Experience With Employment Arbitration Has Prompted An Expansion Of Procedural Safeguards And Resolution Options

Although the genesis of the Due Process Protocol was to offer protection specifically for statutory employment claims encompassed by mandatory arbitration programs, the widespread adoption of employer promulgated plans conforming to the safeguards of the Due Process Protocol has had a much broader impact. Invariably, the safeguards of the

advisory committees composed of individuals from various constituencies including the American Civil Liberties Union and Equal Employment Opportunity Commission, members of the labor community, and plaintiff and management attorneys.

[8] Some critics of employment arbitration have expressed concern that the privacy of AAA-administered arbitration is undesirable because its decisions do not build a precedential body of law. In the fall of 2000, the AAA will be publishing employment arbitration awards, redacting the identity of parties, thus addressing this concern.

Due Process Protocol have been extended to *all* disputes arising out of the employment relationship, including non-statutory claims. In fact, only 770 of the 6200 employment cases filed with the AAA from 1997 through June 2000 (*i.e.*, about 12%) involved statutory issues, but all of them benefitted from the Due Process Protocol's protections.

The widespread acceptance of the Due Process Protocol has also expanded the type of remedial procedures available to workers, as employers who implement employment ADR programs typically offer a multi-step process before arbitration. These programs have made available to millions of workers a wider range of dispute resolution alternatives – from very informal processes such as peer review and open door policies, to progressively more structured or formal options such as ombudspersons, mediation, and binding arbitration.

In addition, company programs increasingly offer variations on mandatory pre-dispute arbitration, including some which allow the employee the discretion to determine whether to opt-in to arbitration after a dispute arises and others which compel a multi-step dispute resolution process, culminating in an arbitration the results of which are binding only on the company. The multi-step dispute resolution policies of Texaco and TRW, for example, require the company to abide by an arbitrator's decision if the employee accepts it, but permit the employee to pursue a lawsuit if dissatisfied with the arbitrator's award. Eaton Corporation's program compels the company to arbitrate disputes at the request of its employees.

Moreover, many employer-promulgated programs expand the definition of arbitrable disputes to encompass employee grievances that otherwise would not be cognizable in court. In

these programs, employees often are permitted to resolve other employment-related concerns through the ADR program (*e.g.*, those involving promotions, compensation, and company policies). Thus, although the original intent of the Due Process Protocol was only to provide protections for statutory claims, the vast majority of employment claims – and, certainly, all claims administered by the AAA – are administered in conformance with these due process requirements. And, of course, under the FAA a contract for arbitration that is overreacting is voidable under grounds "as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

D. The Availability Of Arbitration Has Prompted The Early Resolution Of Workplace Disputes

Contrary to predictions that widespread use of ADR agreements for employment disputes would result in a flood of arbitrations, actual experience has been far different. Due to the variety of options offered by most employers' in-house dispute resolution programs, the vast majority of disputes brought under dispute resolution programs are resolved before arbitration.[9] Moreover, a significant number of those disputes that actually proceed to filing for arbitration with the AAA settle before an arbitration award is issued. As previously indicated, approximately five million workers are covered by employment dispute resolution programs that provide for the AAA to administer the arbitration, often as the final step.

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[9] For example, Darden Restaurants recently reported that in 1999, 50,000 calls were made to the employee toll-free hotline, the first step in the company's multi-step procedure, which also includes peer review, mediation and arbitration. Only two cases have advanced to arbitration since the program was initiated in 1997. *Conference Report: Workplace Conflicts Examined at Bowie State*, ADR REPORT, June 21, 2000, at 4.

Despite the large number of individuals covered by these programs, in 1999, the AAA had approximately 1500 arbitrations filed, and half of those arbitrations resulted from individual employment contracts that contained a negotiated arbitration clause.

E. Employment Arbitration Is At Least As Effective For Employees As Litigation

The concern that arbitration is less favorable to employees than litigation similarly is unfounded. A recent article by the former director of the American Civil Liberties Union's *National Task Force on Civil Liberties in the Workplace* compared the results of AAA employment arbitration decisions with litigation results and concluded that "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, DISP. RESOL. MAG., Fall 1999, at 23, 24. Arbitration also favors employees to the extent that, in arbitration, their claims are more likely to reach a hearing on the merits rather than be subject to dismissal on summary judgment in court. By comparison, research suggests that "[e]mployers win 98 percent of cases which are resolved through summary judgment." *Id.* at 24. As Mr. Maltby concluded, he "'would rather get a fair arbitration than a nonexistent jury trial'". Janet Novack, *Silver Lining*, FORBES, Nov. 21, 1994, at 124.

The process of arbitration itself also provides a variety of benefits over traditional litigation. It is widely accepted that arbitration produces a decision through a less costly and more expedient process than a court proceeding. As this Court has

recognized, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). These considerations apply with particular force to individuals who seek to assert their rights against corporate employers.

Arbitration also resolves disputes more quickly from filing to finality, particularly in comparison with the pursuit of statutory employment disputes through court or administrative proceedings. The Bureau of Justice Statistics recently reported that the average length of time from filing of civil rights complaints (including employment-related claims) to disposition in federal district courts in 1998 was 13.1 months, with a median of 10.9 months. *See* Marika F. X. Litras, *Bureau of Justice Statistics Report on Civil Rights Complaints Filed in U.S. District Courts*, 13 Daily Lab. Rep. (BNA) at E-5, E-15. And, although reduced from previous years, the Equal Employment Opportunity Commission's ("EEOC") processing time for resolving charges of discrimination was reported in 1999 to be 268 days. *See* Jenna Greene, *EEOC Whittling Away Backlog*, LEGAL TIMES, Oct. 4, 1999, at 20. By comparison, in 1999, the AAA's average time from filing to closing (*i.e.*, cases awarded, settled or withdrawn) was only 118 days, with a median of 105 days. In addition to reducing the time to resolution, arbitration also correspondingly reduces the strain of employment litigation on courts and agencies, which, as a practical matter, cannot offer employees an equally rapid resolution.

Moreover, realistically, arbitration may often provide the only avenue for redress for some employees who otherwise would be unable to obtain legal representation to pursue a claim in court. According to one study, due to the wide-spread requirements of plaintiffs' attorneys that a potential plaintiff pay a retainer and have minimum provable damages, "only one in 20 employment discrimination claimants can get a lawyer to pursue the case." William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 45. However, an employee who would not have been able to find (or afford) an attorney to pursue her claim in court often can utilize her company's ADR procedure, up to and including arbitration, with or without legal representation, and obtain a just resolution. Under some programs, the employer will pledge not to use an attorney if the employee does not. In addition, the relative informality of the arbitration process, as well as the absence of the application of strict rules of evidence, reduces the disadvantage to the employee of proceeding on a *pro se* basis. Furthermore, in cases in which legal representation is desirable, the programs of certain employers

may assist the employee in paying for the costs of such representation.[10]

The availability of arbitration over this post-*Gilmer* decade, coupled with the widespread use of the Due Process Protocol, has produced an effective national system for the resolution of all types of employment claims, including claims that would never be heard in litigation.

In sum, the FAA's 75-year-old policy of favoring arbitration has become embedded nationally in routine employment practice. The Ninth Circuit's interpretation of the FAA would require employers to attempt to enforce these arbitration programs under varying state laws, rather than under a single consistent national policy. Multi-state employers and their employees would then face vastly different results depending upon the state where the particular employee is employed. Alternatively, some companies might choose to abandon their ADR programs altogether. By contrast, the continued national enforcement of employment arbitrations under the FAA provides both a high degree of consistency and due process protection. This well-established existing system of workplace arbitration can be a fair, effective and efficient means of

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[10] For example, Philip Morris Management Corp.'s Dispute Resolution program provides assistance to employees in paying attorney fees as well as other expenses of pursuing their claims through arbitration and mediation. *See Forum: Employment Disputes and ADR*, THE METROPOLITAN CORPORATE COUNSEL, Nov. 1996, at 51. The Dispute Resolution Program of Brown & Root (now Halliburton's Kellogg-Brown & Root) similarly compensates employees for legal expenses; however, the company reports that, in two-thirds of the arbitrations which occurred in the first three years of the program, the employee elected to proceed without legal counsel. *See id.*

resolving a large number and broad range of employment disputes when due process is protected.

CONCLUSION

WHEREFORE, the AAA, as *amicus curiae,* respectfully urges the Court to reverse the decision of the court below.

Respectfully submitted,

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